IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 7, 2008 Session

DUSTIN SCOGIN v. AUDRY SORG

Appeal from the Juvenile Court for Montgomery County
No. 116-113 Wayne C. Shelton, Judge

No. M2007-01912-COA-R3-CV - Filed January 30, 2009

On Mother's petition to modify a permanent parenting plan and Father's counterpetition to modify the parenting plan, the juvenile court modified the parenting plan to make Father the primary residential parent with Mother having parenting time every other weekend and alternate Wednesdays during the school year. Mother appeals arguing that the juvenile court erred in failing to find a material change of circumstances. We have concluded that the evidence supports a finding of a material change of circumstances, but that the evidence preponderates against the trial court's conclusion that making the Father the primary residential parent was in the child's best interest.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Reversed and Remanded

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Jennifer Sheppard, Nashville, Tennessee, for the appellant, Audry Sorg.

Carrie W. Gasaway, Clarksville, Tennessee, for the appellee, Dustin Scogin.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Dustin Scogin ("Father") and Audry Sorg ("Mother") are the parents of a minor child, A.T.S., born in January 2002. At the time of the birth of A.T.S., Mother was 16 years old and Father was 17 years old.

In September 2003, Father filed a petition to establish paternity and to adopt a parenting plan. Mother answered and counterpetitioned for child support. In March 2004, the Juvenile Court for Montgomery County entered an agreed order declaring Father to be the natural father of A.T.S. and ordering him to pay child support. The order adopted an agreed parenting plan designating Mother

as the primary residential parent and providing that Father would have regular parenting time every other week from Tuesday at 6:00 p.m. until Thursday at 6:00 p.m. and every week on Wednesday from 5:30 until 7:30 p.m.. The plan also provided for Father to have parenting time on certain holidays and during the summer.

In September 2005, Father filed a petition for contempt and to modify parenting plan and Mother filed a counterpetition for modification of the parenting plan. After a hearing in April 2006, the court determined that there had been a material change in circumstances and that the best interest of the child required that the parenting plan be modified.[1] In an order entered in May 2006, the court instructed the parties to "attempt to agree on a residential schedule that will be in effect from now until the child starts kindergarten that provides the parties with as close to 50/50 [parenting time] as possible." Mother was to remain the designated primary residential parent. In accordance with this order, the parties agreed on a parenting plan providing that A.T.S. would alternate weeks with his parents. Father's child support obligation was reduced accordingly. The court further stated in its order that it would "not establish a residential schedule for after the child begins kindergarten." If the parties were unable to agree on a residential schedule applicable when A.T.S. started kindergarten, the court would decide the issue at that time.

On October 9, 2006, Mother filed a petition seeking modification of the parenting plan and a finding of contempt. Her petition includes the following allegations:

> Since the hearing [in April 2006], [Father] has refused to provide [Mother] with information concerning the minor child's day care including [its] name and location although she has attempted by speaking to [Father] and her attorney had contacted [Father's] attorney concerning this matter.
>
> [Father] has cancelled appointments with medical providers for the minor child and has failed to discuss these cancellations with [Mother] to allow her to arrange to keep these appointments.
>
> That these cancellations have caused the child to have two (2) ruptured ear drums within a two (2) week period of time since the surgery was to have occurred.
>
> . . . .
>
> [Father] has refused to provide the insurance information to the providers and pharmacies and therefore has caused the parties to incur unnecessary expenses which [Mother] is unable to afford.

[1] While finding that "[n]either party is appreciably negative nor positive," the court expressed concern "about the lack of dental care and the medical care the child has received."

> [Father] has refused to provide the medical providers and day care information about [Mother] and therefore has prevented her from receiving information available to her pursuant to her parental rights . . . .
>
> . . . .
>
> [Father] has continually harassed and attempted to belittle [Mother] in the presence of the minor child and in public.

Mother alleged a material change in circumstances and requested modification of the parenting plan to give Father parenting time every other weekend and one evening during the week.

Father responded with an answer and counterpetition. Father's allegations offered to support a finding of a material change in circumstances include the following:

> [Mother's] home is unstable. [Mother] has moved since the last hearing and has not provided her address to [Father]. [Father] believes that [Mother] is living with a different male from the one with whom she was living at the time of the hearing of April 19, 2006. Further, because of [Mother's] move, the parties no longer live in the same school district.
>
> The child has had ringworm on multiple occasions when [Father] has gotten him from [Mother]. This has apparently resulted in one of the child's legs being scarred.
>
> [Mother] has insisted that the child continue to see a doctor in Springfield even though neither of the parties lives there.

Father asserted that the best interest of A.T.S. required modification of the parenting plan to make him the primary residential parent.

After a hearing on May 21, 2007, the court entered an order dated July 6, 2007, making Father the primary residential parent based upon a finding "that the Father's home is more stable." The court expressed concern "about the maturity and anger level between these parties." Noting that Father's proposed parenting plan only allowed Mother 52 days a year, less than the standard visitation, the court modified this plan to provide that Mother would have regular parenting time every other weekend and an overnight visit on alternate Wednesday nights. During the summer, Mother and Father would alternate weeks. Mother was ordered to pay child support. Mother appeals the July 2007 order making Father the primary residential parent.

EVIDENCE PRESENTED AT HEARING

Given the opposing allegations and differing characterizations of events involved in this case, we find it necessary to summarize the testimony presented at the hearing on May 21, 2007.

The parties testified first. *Mother* testified that she was living with her mother in Robertson County and had fulltime employment in that county. The maternal grandmother took care of A.T.S. when Mother worked. Mother had been working at her current place of employment for almost a year.

Mother testified about A.T.S.'s problems with recurring ear infections. She gave Father notice of A.T.S.'s doctor appointments, but Father was unable to attend most appointments due to the short notice. A.T.S. was referred to an ear specialist regarding surgery. After the initial appointment, a surgery date was scheduled, but Mother was later notified that the surgery had been postponed due to insurance problems. According to Mother, the specialist's office did not know who she was when she called about the surgery cancellation because Father did not provide the office with information about her when he completed forms before the initial appointment. Mother further testified that, after Father took A.T.S. to another preoperative appointment with the specialist, she was contacted by the Department of Children's Services. Although the nature of DCS's inquiry is unclear from the record, it appears that DCS called in relation to the child's health condition and treatment.[2]

Mother further testified that she had TennCare as a secondary insurance plan for A.T.S.[3] She received letters from Father stating that she owed money for medical bills. She asked Father about the TennCare coverage, but to her knowledge he had never filed the claims with TennCare.

At the time when she filed her petition for modification in October 2006, Mother did not know the name and location of the preschool to which Father took A.T.S. during Father's week of parenting time. According to Mother, when she asked Father about the preschool, he gave her vague descriptions ("on the other side of the river") or spoke so fast that she could not understand him. Father allegedly told her that he did not give her the information because he could not trust her to go to the day care. About two months after A.T.S. started at the preschool, Mother figured out which preschool he was attending.

Mother further testified that Father signed A.T.S. up for soccer and baseball without notifying her. Father told her about soccer the night before the team picture when Father called to see if A.T.S. could stay with him overnight. Father told Mother about baseball two days before the first practice. Mother stated that she did not object to her son participating in these activities, but it meant that she had to transport A.T.S. to practices and games during her week at locations that were not close to Mother's home. She testified that Father would not allow her to have A.T.S.'s uniforms. A.T.S. would have to change into his uniform after she brought him to the ball field. Father allegedly told Mother that she was not responsible enough to have the uniforms.

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[2] A.T.S. had the surgery in November 2006.

[3] Father provided A.T.S. with his primary health insurance.

Mother further testified that A.T.S. had symptoms of asthma. At ball games, he would sometimes have labored breathing. He had come out of a few games complaining that he could not breathe and holding his chest.

According to Mother, Father belittled her in public. She stated that Father had presented her with a proposed modified parenting plan in front of a cafeteria full of parents and kids having soccer pictures taken. Mother recalled that, after giving her the parenting plan, Father made a point of telling her that he did not love her any more. By that time, the maternal grandmother had taken A.T.S. outside; Father and his wife were standing there. At one of the soccer games, according to Mother, Father told A.T.S. not to go on Mother's side of the field because it was Father's week.

Mother stated that Father had not allowed her to have input in decisions regarding A.T.S.'s sports activities or the timing of his ear surgery, but "I just went along with it so it would be done." She testified, "I just want what's best for my son." Mother proposed a parenting schedule with Father seeing A.T.S. every other weekend and for an overnight visit one day a week. A.T.S. was about to start school in August 2007.

On cross-examination, Mother stated that she and A.T.S. lived with her mother and father in a house with three bedrooms. She admitted that A.T.S. sometimes wanted to know when he was going to Father's house; when she talked to A.T.S. over the telephone when he was at his Father's house, he would ask how long before he would be with her.

Mother testified that she always put A.T.S. in a car seat. When they went on a trip to Florida with her boyfriend, Mother told Father the name of the town where they would be staying and gave him her cell phone number. She stated that she did not know the name of the lodging where they were staying until they got there but admitted that she did not call Father with the information after they arrived. Mother stated that she had been dating her current boyfriend for seven months and that this was not the same boyfriend with whom she had been living at the time of the April 2006 hearing.

In April 2006, Mother lived in Clarksville, Montgomery County. In June 2006, she moved to Robertson County to live with her parents. She had changed jobs one time since the previous hearing.

As to the preschool, Mother acknowledged that she had refused to pay for half of the fees because she could not take A.T.S. to the preschool during her week due to the distance. She testified that she had called the preschool to ask about A.T.S. and was told that she was not listed on the information sheet. According to Mother, she was told by the preschool that if she came to get A.T.S. she "would be escorted off the premises and DCS would be called."

Asked about the soccer and baseball practices, Mother testified that she had taken A.T.S. to the majority of the practices. She denied that she and her boyfriend had gotten into a fight in the parking lot at the ball field.

At this point in the hearing, Father's counsel introduced into evidence a pair of tennis shoes worn by A.T.S. the last time he came to Father from his Mother's house. Father alleged that the shoes were wet and smelled of cat urine. Mother denied that pets came inside the house where she lived. She admitted that A.T.S. played with cats, but denied that his shoes were ever left outside or would have cat urine in them. Mother stated that these were play shoes, admittedly old and worn. A.T.S. went outside and played in the shoes, which might smell of sweat. The shoes are not part of the record on appeal.

Next, Father introduced into evidence a pair of size 2T shorts that A.T.S. had been wearing the last time he came from his Mother's house. Mother admitted that, although he was five years old, A.T.S. wore some 2T clothes that still fit him. The shorts are not part of the record on appeal.

Father questioned Mother about her smoking habits. Mother admitted that, prior to A.T.S.'s ear surgery in November 2006, she had smoked in the car with him. She testified that she did not smoke in the house and no longer smoked in the car with A.T.S.

Asked about occasions when A.T.S. had ringworm, Mother stated that she knew of only once and had taken him to the doctor for treatment.

Responding to the allegation that she had told Father she still loved him, Mother denied making such a statement. She testified that she told Father she had to care about him because he was A.T.S.'s father and that "I can't go around saying I hate him" because "then I wouldn't love my child and that's not right."

Mother was also asked about an incident at the child's preschool graduation. When the children came in, they had flowers for their parents. According to Mother, she got up to take pictures in the back. When he saw her, A.T.S. walked over, gave her a kiss, and handed her the flowers. Mother later testified that, when A.T.S. gave her the flowers, Father "kind of looked shocked" and Father's wife "started to cry."

As to her living arrangements, Mother testified that she lived with her parents only. She admitted that her brother and his wife had also lived there for about three months and had moved out about six weeks prior to the hearing. During that time, A.T.S. had slept in a separate bed in Mother's room.

Father testified that Mother had declined to look at preschools with him because she did not have the money. It was difficult for him to find a preschool where they did not have to pay every week. Father admitted that he initially refused to give Mother the name of the preschool because she had been "uncooperative" with doctors in the past and he "didn't want to lose the only day care we had found to work with us." Father asserted that they had to change dentists because of problems with Mother.

Father testified that he informed Mother about the soccer team about two weeks before the pictures, which were taken before the season started. He stated that he had informed Mother about baseball about two weeks before the beginning of the season. Father was A.T.S.'s T-ball coach. He stated that Mother brought A.T.S. to 75 to 80% of the soccer and baseball practices during her week. A.T.S. came to all of the baseball games and 75 to 80% of the soccer games during Mother's week. Over Mother's objection, Father introduced into evidence snapshots of A.T.S. playing ball; Father appeared in one of the pictures.

Father testified that Mother's boyfriend had been with her at some of the ball practices and games and that he had once observed them in the parking lot. It appeared to Father that Mother and her boyfriend were arguing. A.T.S. was on the field at the time.

Father testified that, when Mother and A.T.S. pulled into the driveway after the trip to Florida, he observed that A.T.S. was not sitting down in his car seat: "It looks like he was standing up turning around."

When asked about the shoes and shorts that had been introduced into evidence, Father testified that the shoes stank on more than one occasion when A.T.S. came to his house; Father thought they smelled like cat urine. He had put them outside and had washed them. Father testified that A.T.S. would be wearing socks that were wet and smelly; Father again identified the smell as cat urine. Photographs of the socks were introduced into evidence but are not part of the record on appeal. Father also introduced photographs of A.T.S.'s foot with a blister and of his dirty feet.

According to Father, A.T.S. wore size 4T to 6T clothes. He stated that, in addition to the previously identified shorts, A.T.S. had worn other size 2T clothing when he came from his Mother's house. A photograph showed a pair of underwear of size 2T-3T.

Father was questioned regarding photographs purportedly showing two instances since April 2006 when A.T.S. had ringworm on his leg. A third picture purportedly showed scarring from ringworm. Father admitted on cross-examination that he had not taken his son to the doctor for the pictured episodes of ringworm. The pictures regarding ringworm are not part of the record on appeal.

Father testified that he and his wife lived in a three-bedroom house with one dog. A.T.S. had his own room at Father's house. Pictures of A.T.S.'s room and bathroom were admitted into evidence, as was a picture of a trophy A.T.S. won at a tractor pull that he and Father attended. Father testified about the activities he and A.T.S. did together.

According to Father, he had presented Mother with a proposed parenting plan because she had said "she couldn't financially support [A.T.S.] and that she was having a hard time with him." Father contended that Mother had told him A.T.S. "seemed happier at our house than he did whenever he was with her." Father said Mother told him she still cared for him. He admitted telling

Mother, when he gave her the parenting plan, that he did not love her anymore. Father testified that, when he made that statement, only his wife was present. He did not know if other parents were nearby.

As to the cancelled surgery, Father stated that his insurance was treating A.T.S.'s ear problems as a pre-existing condition and that he was waiting for insurance through his wife's employment[4] to take effect to cover the surgery. The wife's insurance did ultimately cover A.T.S.'s surgery. Father testified that he had never had a copy of A.T.S.'s TennCare card. On cross-examination, Father admitted that he had refused to give medical providers the TennCare information because "I don't like paying higher taxes."

Asked why he had not allowed Mother to take A.T.S.'s uniforms, Father testified that he "didn't want his clothes coming back stinking and I couldn't trust her to bring them back." He stated that he had problems in the past with Mother failing to return A.T.S.'s clothes. Father testified that A.T.S.'s clothes sometimes smelled like cat urine; at other times, like mildew.

Father testified that A.T.S.'s previous doctor had called him about problems with Mother. The same thing happened with A.T.S.'s dentist. Father got A.T.S. in with another doctor. Father denied allegations that the problems resulted from multiple calls by him or his wife to cancel appointments. Father admitted that he did not give Mother's information to the medical providers.

Father testified that he did not want A.T.S. to be at his paternal grandfather's house because Father's stepmother and stepbrothers used drugs. The stepbrothers lived with the stepmother off and on. Father testified about an incident at Christmas 2006 when he refused to allow Mother to take A.T.S. to the paternal grandfather's house. Shortly thereafter, according to Father, Mother took A.T.S. to his paternal grandfather's house.

During a visit around Christmas time, Father and the paternal grandfather had a physical altercation after the paternal grandfather called Mother to allow A.T.S. to speak to her even though Father had told him they would call Mother later. Father told the paternal grandfather not to interfere in his decisions concerning A.T.S.. Father testified that the paternal grandfather tore Father's shirt and broke his glasses. According to Father, A.T.S. was inside Father's grandmother's house during this altercation.

Kiana Sorg, the child's maternal grandmother, testified about the living arrangements at her house. Mother introduced into evidence pictures of the house and A.T.S.'s room; these photographs are not part of the record on appeal. Ms. Sorg estimated that her son and daughter-in-law had lived with her for six or seven months. She testified about A.T.S.'s problems with recurrent ear infections.

Ms. Sorg testified that she had been present when Father said inappropriate things about Mother in A.T.S.'s presence. Once at the soccer field, when A.T.S. came over to Mother and told

[4] Father's wife worked for the Montgomery County Chancery Court.

her that he did not feel good, Father told Mother "right in front of everybody" never to pull A.T.S. off of the field. As to the incident when Father gave Mother the parenting plan, Ms. Sorg testified that Father told her to leave so she would not hear what he was going to say. Ms. Sorg also corroborated Mother's testimony concerning a time at a baseball game when Mother told A.T.S. to come sit in the shade until the game started and Father disagreed. Ms. Sorg testified that there were a few times when Father "raised his voice at [Mother] in front of [A.T.S.] . . . ."

Ms. Sorg confirmed that she had taken care of A.T.S. since birth when Mother was at work. She testified that she would be able to continue to watch him before and after school. Ms. Sorg stated that, since A.T.S.'s ear surgery, she went outside the house to smoke.

Tammy Scogin, Father's stepmother, was called as a witness by Mother. Ms. Scogin denied using drugs, but admitted that all three of her sons had probably used drugs. The youngest stepson had moved out in April 2007; Ms. Scogin and her husband "booted him out" because he would do drugs at their house and at his mother's house. Ms. Scogin testified that Father had denied her and her husband, William Scogin, the right to see A.T.S. since he was born. Mother would allow them to see A.T.S. about once a month.

Ms. Scogin witnessed the altercation between William Scogin, the child's paternal grandfather, and Father. Mother called and said she was trying to reach Father because she wanted to check on A.T.S. When they arrived at William Scogin's mother's house,[5] Ms. Scogin told Father that Mother was looking for him. The next thing Ms. Scogin knew, William Scogin was handing A.T.S. the telephone to talk to Mother. Later that evening, Father and William Scogin went outside and got into the altercation described above. According to Ms. Scogin, Father told William Scogin that "if you ever disobey me again, I'll make sure you never see . . . A.T.S. again." Ms. Scogin testified that A.T.S. "was screaming" and that "[t]hey put him in the car."

William Howard Scogin, A.T.S.'s paternal grandfather, testified that, other than one Christmas, Father had not brought the child to see him and his wife. Mother had brought A.T.S. to see them. Asked the reason for Father's refusal to bring A.T.S. to their home, Mr. Scogin stated that it "seems like to me we have a feud here on picking sides." Father told Mr. Scogin that "I [chose] her side instead of his." He corroborated his wife's testimony concerning the altercation that occurred between him and Father. Mr. Scogin stated that he called Mother and handed the phone to A.T.S. He admitted that Father had told him that he would talk to Mother later.

Mr. Scogin stated that he had never used drugs and did not allow the use of drugs in his home. He admitted that some of the "kids" probably used drugs, but he did not allow it. It was Mr. Scogin's impression that most kids used drugs.

Brittany Scogin, Father's wife, testified on his behalf. She stated that, when A.T.S. came to their house, his clothes and shoes were "constantly dirty" and were not the right size. Ms. Scogin

[5] This is the home of A.T.S.'s paternal great-grandmother.

stated that there had been yellow liquid in A.T.S.'s shoes and that it smelled like urine. His socks had been dirty and wet on several occasions; they, too, smelled like urine. Ms. Scogin further said that A.T.S.'s clothes smelled like mildew, like they had not been washed in several wearings. His clothes were often not the right size and had holes and stains on them. She would immediately take the clothes off of A.T.S. and wash them. Asked about the size 2T shorts, Ms. Scogin stated that they did not fit A.T.S.; they were too short and left red marks around his waist.

Ms. Scogin recalled at least one time when A.T.S. appeared not to be restrained in a car seat when he arrived with Mother. She had observed Mother and her boyfriend at the ball park and stated that they argued. On cross-examination, she admitted that she could not hear what they were saying.

As to the incident when Father gave Mother a parenting plan, Ms. Scogin testified that she was present and that there was no one else around at the time. She heard Father tell Mother that he no longer had feelings for her but thought that he was polite. She corroborated the prior testimony concerning the altercation between Father and William Scogin.

ISSUES ON APPEAL

Mother raises two main issues regarding the trial court's determination to make Father the primary residential parent. First, she asserts that the trial court erred by finding that there did not need to be a material change of circumstances to modify the parenting plan. Second, Mother argues that the trial court erred in its best interest determination. Mother also raises an issue regarding the admission of photographs of A.T.S. playing baseball and argues that she is entitled to her attorney fees and costs on appeal.

STANDARD OF REVIEW

In cases involving custody and visitation, our review of the trial court's findings of fact is de novo with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002); *Marlow v. Parkinson*, 236 S.W.3d 744, 748 (Tenn. Ct. App. 2007). When the trial court makes no specific findings of fact, however, we must review the record to determine where the preponderance of the evidence lies. *Kendrick*, 90 S.W.3d at 570.

Determinations regarding custody and visitation "often hinge on subtle factors, including the parents' demeanor and credibility during the divorce proceedings themselves." *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). We "give great weight to the trial court's assessment of the evidence because the trial court is in a much better position to evaluate the credibility of the witnesses." *Boyer v. Heimermann*, 238 S.W.3d 249, 255 (Tenn. Ct. App. 2007). Thus, the courts will not disturb a trial court's parenting plan unless its decision is based on a material error of law or is contrary to the preponderance of the evidence. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997).

ANALYSIS

Material change of circumstances

It is now well-established that, in order to modify a parenting plan to change the primary residential parent, the trial court must apply a two-part analysis: the court must find that "both a material change of circumstances has occurred and a change of custody is in the child's best interests." *Kendrick*, 90 S.W.3d at 575. In the present case, the trial court did not make a finding on the issue of material change of circumstances. In fact, as pointed out by Mother, the trial court stated at the hearing that "the Court doesn't have to make that finding [of a material change of circumstances] because of the reservations it made in the previous hearing" regarding a parenting plan to apply once A.T.S. started school.

We have concluded that we need not address the legal issue raised by Mother because there is ample support in the record for a finding of a material change of circumstances. The relevant statutory provision, Tenn. Code Ann. § 36-6-101(a)(2)(B), provides in pertinent part as follows:

> If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

Tenn. Code Ann. § 36-6-101(a)(2)(C), enacted in 2004, provides for a less stringent standard with respect to a material change of circumstances pertaining to a residential parenting schedule only, not to a change in custody. *Massey-Holt v. Holt*, 255 S.W.3d 603, 608 (Tenn. Ct. App. 2007). Since the trial court changed the primary residential parent from Mother to Father, we must apply the more stringent standard contemplated by Tenn. Code Ann. § 36-6-101(a)(2)(B) with respect to changes in custody.[6]

As noted by the court in *Kendrick*, "'[t]here are no hard and fast rules for determining when a child's circumstances have changed sufficiently to warrant a change of his or her custody.'" *Kendrick*, 90 S.W.3d at 570 (quoting *Blair v. Bandenhope*, 77 S.W.3d 137, 150 (Tenn. 2002)). Several factors to consider when making this determination are whether the change occurred after the entry of the order to be modified, whether the asserted change was known or reasonably anticipated at the time of the original order's entry, and whether the change "'affects the child's well-being in a meaningful way.'" *Id.* (quoting *Blair*, 77 S.W.3d at 150).

[6] As a practical matter, Mother and Father both sought a change from joint custody to one parent having primary custody and the other exercising visitation.

Evidence that an existing custody arrangement has proven unworkable may be sufficient to satisfy the material change in circumstances test. *See Vaccarella v. Vaccarella*, 49 S.W.3d 307, 316 (Tenn. Ct. App. 2001); *Siniard v. Siniard*, No. E2003-01960-COA-R3-CV, 2004 WL 2709196, *6 (Tenn. Ct. App. Nov. 29, 2004). This court has recognized that a "cooperative spirit" is "essential to a workable joint custody arrangement." *Jahn v. Jahn*, 932 S.W.2d 939, 942 (Tenn. Ct. App. 1996). It is obvious from the testimony at trial and the trial court's expression of concern over the parties' level of anger and maturity that Mother and Father are not able to work together for the benefit of their child, A.T.S. Rather, their relationship has devolved into a battle for control over A.T.S. Mother and Father have exhibited an inability to cooperate over decisions with respect to medical care, schooling, and activities for their child. Moreover, both parties alleged a material change in circumstances in their respective petitions for modification.[7] We are satisfied that the evidence of record is sufficient to support a finding of a material change of circumstance in this case.

Best Interest

The second part of the inquiry regarding modification of custody is to determine whether a change in the primary residential parent is in the child's best interest. *Kendrick*, 90 S.W.3d at 572. In making a best interest determination, we are guided by the statutory factors set out at Tenn. Code Ann. § 36-6-106(a). The burden of proof is on the parent seeking a change in custody, Father in this case, to establish that changing custody is in the best interest of the child. *Agee v. Agee*, No. W2007-00314-COA-R3-CV, 2008 WL 2065996, *5 (Tenn. Ct. App. May 16, 2008). The only pertinent finding made by the trial court is that "the Father's home is more stable and therefore, the Father should be the primary residential parent."

We will proceed to analyze the application of each factor set out in Tenn. Code Ann. § 36-6-106(a) to the facts of this case.

(1) *The love, affection and emotional ties existing between the parents . . . and the child*. The parties are in agreement that there is no proof to establish that this factor favors Mother or Father.

(2) *The disposition of the parents . . . to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent . . . has been the primary caregiver*. On the issue of medical care, Mother introduced testimony that Father had refused to file for TennCare coverage, thereby causing a five-month delay in surgery to alleviate A.T.S.'s chronic ear infections. Father explained that he wanted to wait until his wife's insurance would cover the surgery, but admitted that he had refused to submit a claim through TennCare. Father introduced evidence that A.T.S. had contracted ringworm on several occasions but admitted that he had not sought treatment for the skin condition. Mother could recall only one instance of ringworm, for which she had taken A.T.S. to the doctor. It appears to this court that the problems in obtaining

[7] As noted in the previous footnote, Tenn. Code Ann. § 36-6-101(a)(2)(B) and (C) establish different criteria with respect to modification involving a change of custody, as requested by Father, and a change of the parenting schedule, as requested by Mother.

appropriate and timely medical treatment for A.T.S. stemmed from a failure of communication between the parents, especially on the part of Father, and not from an unwillingness or inability to provide needed care on the part of either parent.

As to Father's decision to enroll A.T.S. in preschool, we find Mother's desire to keep A.T.S. in the care of his maternal grandmother to be reasonable, especially in light of her testimony that she could not afford to share the preschool costs and that the preschool in Montgomery County was a significant distance from her home in Robertson County. The preponderance of the evidence indicates that Mother made an effort to bring A.T.S. to soccer and baseball practices during her week, despite the inconvenience caused by distance.

As to clothing, Father submitted proof to indicate that Mother dressed A.T.S. in clothes that were too small for him and that his clothes were often dirty and smelled of cat urine. Mother asserted that A.T.S. was just a normal boy who went outside and got dirty and that his clothing, regardless of the size, fit him. We cannot tell from the court's order how much, if any, significance it gave to the articles of clothing introduced into evidence by Father since those items are not part of the record on appeal and the court's order does not include specific findings.[8] Overall, we find the evidence concerning the parents' disposition to adequately care for A.T.S.'s needs to slightly favor Father.

Mother was the primary caregiver for the first five years of A.T.S.'s life. However, the parents had joint custody from April or May of 2006 until the hearing in May 2007. Given the child's recent experience living with both parents an equal amount of time, we find this factor equivocal.

(3) *The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment*. A.T.S. lived equal amounts of time in both parents' households for the years preceding the hearing. Father presented evidence that he and his wife lived in a three-bedroom house where A.T.S. had his own bedroom and bathroom. Father asserts that Mother's home environment "changed multiple times during the litigation" and that Father's home was therefore more stable. The proof does not support the notion that Mother moved multiple times. Except for a brief period when Mother lived with a boyfriend, she and A.T.S. lived with the maternal grandmother, who also took care of A.T.S. during the day when Mother was at work; thus, Mother moved out of her mother's house and then back to her mother's house. Father elicited testimony that Mother's brother and wife had lived in the maternal grandparents' household for a period of months while Mother and A.T.S. were also living there. Mother testified that A.T.S. slept in his own bed in her room during that period of time. There is no evidence that this arrangement was harmful or that Mother's brother and sister-in-law had a detrimental influence on A.T.S.

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[8] Tenn. Code Ann. § 36-6-101(a)(2)(B)(i), part of the provisions concerning modification of orders pertaining to custody, states that, "[i]n each contested case, the court shall make such a finding as to the reason and the facts that constitute the basis for the custody determination." The trial court in this case failed to make findings sufficient to allow this court to understand the basis for its best interest determination.

The evidence supports a conclusion that both parties provided a stable, satisfactory environment for A.T.S.

(4) *The stability of the family unit of the parents.* Mother's family unit consists of the maternal grandmother and grandfather, who provide Mother and A.T.S. with a place to live. The maternal grandmother has provided child care for A.T.S. since birth. Father, too, has a stable household for A.T.S. with his wife, who testified about her role in caring for the child. Neither party alleges that the immediate household of the other is less than satisfactory.

There is an issue, however, as to Father's strained relationship with the paternal grandfather and paternal step-grandmother. Father has strong concerns about the detrimental influences that might exist in the paternal grandfather's home, and there was some testimony to support his concerns. Despite Father's concerns, Mother has allowed A.T.S. to visit in the home of the paternal grandfather. When the paternal grandfather and step-grandmother initiated telephone contact between A.T.S. and Mother, Father confronted the paternal grandfather and a physical altercation occurred. There was testimony that A.T.S. witnessed some of this incident and was upset by it. Father threatened to keep the paternal grandfather from seeing A.T.S. because he was taking Mother's "side." The hostility between Father and other family members appears to result in some negative consequences for A.T.S.

We conclude that both immediate family units are stable, but that the instability and animosity in Father's extended family relationships weigh against him on this factor.

(5) *The mental and physical health of the parents*. The parties agree that this factor is equal as to both parents.

(6) *The home, school and community record of the child*. Although Father argues that this factor favors him because A.T.S. thrived in preschool and the extracurricular activities in which Father involved him, the preponderance of the evidence shows that Mother supported these activities to a significant extent, despite inconveniences. There is no evidence that A.T.S.'s time in the care of his maternal grandmother was less than beneficial. We think this factor is equally favorable on both sides.

(7) *The reasonable preference of the child, if twelve (12) years of age or older*. This factor does not apply here.

(8) *Evidence of physical or emotional abuse to the child, to the other parent or to any other person*. The parties agree that this factor does not apply here.

(9) *The character and behavior of any other person who resides in or frequents the home of a parent . . . and the person's interactions with the child*. Father argues that this factor favors him because of the excellent character and behavior of his wife. There is no evidence to suggest that the influence of Mother's parents is not beneficial to A.T.S.; the maternal grandmother has provided day

care since the child's birth. Father did not introduce any evidence of problems related to the influence of Mother's relatives or her boyfriend and his family in A.T.S.'s life. We conclude that this factor is equally favorable to both parties.

(10) *Each parent['s] . . . past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents . . . to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child*. We must conclude that this factor strongly favors Mother. Father's intense protectiveness and desire for control have undermined his willingness and ability to foster a healthy relationship between A.T.S. and Mother. Multiple examples appear in the record. Father refused to give medical providers Mother's contact and insurance information. He resisted giving Mother information about A.T.S.'s preschool and did not inform the preschool of Mother's identity. Father apparently instructed A.T.S. not to talk to Mother at a ball game when it was not "her" week. He became angry when the paternal grandparents called Mother to talk to A.T.S. over the telephone on Christmas Eve and threatened to cut them off from any contact with A.T.S. In his proposed parenting plan, Father proposed giving Mother only 52 days of parenting time a year. While Father's allegations of dirty clothing are troublesome, Father's attempts to minimize Mother's involvement in A.T.S.'s life appear to this court to be even more damaging. Whatever his problems with Mother, Father has an obligation to make a good faith effort to foster a healthy relationship between the child and Mother.

We find that a key factor in this case is each parent's desire and ability to encourage and facilitate a close and continuing relationship between the child and the other parent. *See Burnett v. Burnett*, No. E2002-01614-COA-R3-CV, 2003 WL 21782290, *6 (Tenn. Ct. App. July 23, 2003). Mother expressed and exhibited a willingness to work with Father for the sake of the child's welfare. Father exhibited the opposite inclination.

We conclude that the evidence preponderates against the trial court's decision that making Father the primary residential parent was in the best interest of the child. We, therefore, reverse the trial court's decision and remand for modification of the residential parenting schedule with Mother as the primary residential parent. While we believe the trial court is in the best position to craft an appropriate parenting schedule, the circumstances of this case indicate that Mother should have primary physical custody and that, in light of the animosity between the parties and Father's past unwillingness to cooperate, it may be advisable to give Mother sole decisionmaking authority, particularly with respect to the child's education, non-emergency health care, and extracurricular activities.[9]

In light of our decision to reverse the trial court's custody determination, we deem it unnecessary to address the evidentiary issue raised by Mother.

[9]The trial court will also have to calculate Father's child support obligation based upon the allocation of parenting time.

Mother requests her attorney fees on appeal pursuant to Tenn. Code Ann. § 36-5-103(c). Father counters and asserts that Mother's appeal is frivolous and that he should be awarded his attorney fees on appeal. While Mother has prevailed on appeal, this case involves two parents who have been unable to cooperate in a joint custody arrangement, thereby necessitating a modification. We decline to award either parent attorney fees.

The trial court's judgment is reversed and remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against the appellee.

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ANDY D. BENNETT, JUDGE